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THE ATTRACTIVE NUISANCE DOCTRINE

By Robert E. More of the Denver Bar

ALTHOUGH there are earlier cases bearing on the "Attractive Nuisance" Doctrine, there was little direct discussion of it before 1870, and it is probable that the general interest of the profession in the question was first excited by the decision of the United States Supreme Court in 1873 in *Sioux City, etc.,* R. R. Co. v. Stout.[1]

In other countries the question has not received as much judicial discussion as in the United States. Various English cases have been cited in the American courts, but none of them appears to be a direct decision. Thus *Lynch v. Nurdin*[2] is often referred to as being in support of the doctrine of the Stout case. In the English case, a man left his horse and cart unattended in a *public street.* A child got upon the cart in play and was hurt. The owner was held liable. There the alleged "attractive" chattels were left in a *public* place where the plaintiff and the defendant "had an equal right to be." This, of course, is very different from the case where the owner leaves the chattel on his *own* land, where the child has no right to come. The distinction is clearly pointed out by Mr. Justice Peckham in a leading New York case.[3] The English authorities are in confusion.[4]

The point has been considered in the Scotch courts, but the law there does not seem decisively settled.[5]

In Australia the court of New South Wales favors the land owner.[6]

The Doctrine is, therefore, not only typically American, but is chiefly developed in the American cases. The *Stout*

1—17 Wall. 657.
2—(1841) 1 Q.B. 29.
3—*Walsh v. Fitchburg R.R. Co.,* 145 N. Y. 301 at 311, 312.
4—See *Clerk and Lindsell on Torts,* 2nd Ed. 436; *Beven on Negligence,* 2nd Ed. 183-190.
5—See *Clegg on Reparation,* 231-232; and Guthrie Smith on Damages, 144-147.
6—See *Patterson v. Borough of Woollahra,* 16 New South Wales Law Reports—Cases of Law, 229; also *Slade v. Victorian Railway,* 15 Victorian Law Reports, 190.

case, as is well known, was one where a turntable owned by a railroad was left unlocked and unguarded, although it was so located that children could be attracted to it from places where they might lawfully be, and although the railroad had actual knowledge that children had been in the habit of playing upon it in the past.

Following the *Stout* case, the Supreme Court of Minnesota in the famous case of *Keffe v. Milwaukee and St. Paul R. Co.*[7] fortified the Federal decision and laid down, it is submitted, sounder principles for the future application of the doctrine.

Since that time, many courts have had occasion to accept or reject in whole or in part the "attractive nuisance" doctrine. Courts of New Hampshire, Tennessee, Massachusetts and New York have flatly refused to follow the *Stout* case, even in the case of a turntable. In cases of alleged "dangerous attractions" other than turntables, decisions favorable to the land owner have been rendered in Arkansas, California, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, and Texas.

A very eminent authority upon the law of Torts has argued at length that the doctrine is unsound and should never be applied.[8]

From the welter of decisions on this subject, it is somewhat difficult to state definitely just what the law is. It is believed, however, that the four general principles to be developed hereinafter are supported not only by the numerical weight of authority, but also by sound legal principles. What, then, are the essential elements of the Attractive Nuisance Doctrine as laid down in decisions by courts which support this theory of a landowner's liability to children?

1. *There is no general legal duty, either to children or adults who enter defendant's property without invitation, express or implied, to keep dangerous things from one's land or to use care about them.*

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[7]—(1875) 21 Minn. 207.

[8]—See article by Jeremiah Smith in 11 *Harvard Law Review*, at pages 349 and 434. This article reviews all the cases that had been decided up to the time the article was published and authorities in support of statements heretofore made may be found at the end of Judge Smith's discussion. See also an article by Manley O. Hudson in 36 *H.L.R.* 836.

It is elementary that no duty is owed to trespassers, other than the duty not to injure them wilfully. Accordingly, where a trespasser has been injured, it is immaterial whether or not defendant has failed to exercise due care. There being no duty, the question of due care is never reached. Of course defendant cannot injure plaintiff intentionally. Traps and spring guns are within this latter category.

The Supreme Court of the United States held in a recent decision, which modified the earlier holding in the *Stout* case to a considerable degree, that *"infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon land owners to expect them and prepare for them."*[9]

This fundamental principle was recognized by the Colorado Supreme Court in the case of *Hayko v. Coal Company.*[10] There plaintiff, a boy ten years old, entered an open rough board shack on defendant's premises and abstracted therefrom a box of dynamite caps. Plaintiff tried to pick out the contents of one of the caps with a pin; it exploded and blew off parts of several fingers. The plaintiff contended that the shack and caps were an attractive nuisance and that in any event defendant was negligent in keeping the caps where children could get them. On this second proposition the Court said:

"We know of no general legal duty either to children or adults who enter without invitation, express or implied, to keep dangerous things from one's land or to use care about them, and yet plaintiff's argument premises such a duty. It may be conceded, as far as this point is concerned, that I may not wilfully set a trap, e.g., a spring gun, that I owe a duty of care so as not to entrap one whom I have impliedly invited, as by a walk and steps built up to my front door, or a child whom I have tempted to trespass, and that what would not be a trap to an older person would be to a very young one, but these points do not reach the plaintiff's proposition and we do not assent to it."

2. *The doctrine is inapplicable unless defendant knowingly keeps upon his premises in an unguarded condition an instrumentality that is "unusually" alluring to children.*

The Federal Supreme Court said in the *United Zinc Case supra:*

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[9]—United Zinc & Chemical Co. v. Van Britt (decided March 27, 1922) 258 U. S. 268; 42 Sup. Ct. Rep. 299; 66 Law Ed. 615 at 617.
[10]—77 Colorado, 143.

"On the other hand, the duty of one who invites another upon his land, not to lead him into a trap, is well settled, and *while it is very plain that temptation is not invitation,* it may be held that *knowingly* to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is *certain* to attract them, has the legal effect of an invitation to them, although not to an adult. *But the principle, if accepted, must be very cautiously applied.*"

A few courts have failed to heed the admonition of the Federal Supreme Court that the doctrine "must be cautiously applied". The majority of jurisdictions, however, have recognized that the doctrine must be narrowly limited and that great injustice will result unless the Federal Supreme Court's admonition is heeded.

This is the law in Colorado. In the *Hayko* case Judge Denison said:

"Courts have said and held that it is negligent to maintain on one's own premises any agency that is dangerous and attractive to children. This proposition has been condemned by some courts and even ridiculed. * * * It leads to such absurdities that it is easy to ridicule it; for example, an apple tree bearing green apples is such an agency. It will not do to say that every attractive thing is sufficient to charge a defendant with negligence in enticing children to trespass, because there is nothing that can be said not to be attractive to a child. * * * The attraction must be *unusual* * * * and we think that, as a matter of law, a shack in a mining camp is not an *unusual* attraction."

3. *The doctrine is not applicable unless the instrumentality in question is so located that children can be attracted to it without first committing a trespass.*

It is obvious that this exceptional doctrine can have no applicability unless the attractive, dangerous instrumentality is so situated that children may be attracted by it when acting within their rights. *If the child must first become a trespasser before he can even see the dangerous instrumentality in question, then the doctrine cannot be availed of by him.*

The reason for this rule is apparent. We have the basic principle that no duty is owed to a trespasser save to refrain from injuring him wilfully or by traps. Even though a defendant carelessly maintains upon his premises a dangerous instrumentality he is not liable to a trespasser for the very obvious reason that he owes no duty to one who is trespassing. Children are considered as invitees rather than trespassers, IF defendant has maintained upon his premises something

that is so *"unusually"* attractive that they are drawn to it "as mechanically as a fish is drawn to a bait." But it is obvious that the trespass is never excused nor the invitation implied unless the child is *in fact* attracted by the alluring nuisance. To put a clear case, if a ten-year-old boy climbs over the high board fence surrounding the plant of the General Chemical Company near Valverde, Colorado, and then while wandering around is attracted to a stationary ladder on a vat of sulphuric acid, climbs up and falls in it, it would be entirely immaterial that this ladder and vat were the most attractive things in the world, to children. The child was a trespasser when he climbed over the fence. *The ladder and vat were not visible to him until AFTER he became a trespasser.* His trespass is not excused therefore by the attractive nuisance, as the vat and ladder were not visible to the child when he was at any place where he had a right to be. No implied invitation was extended to him to climb up the ladder. The child was not following the figurative bait but was wilfully trespassing upon another's property.

The Supreme Court of Illinois[11] first announced this qualification of the general doctrine. In the case just cited the dangerous instrumentality was a hoist used by defendant to elevate bricks and mortar in a building under construction. Plaintiff went into the building without being attracted by the hoist, and having thus trespassed saw the hoist, put his hand upon it and was injured. In holding for the defendant the Court said, at page 170:

> "It is a necessary element of the liability that the thing which causes the injury is tempting to children, and constitutes a means of attracting them upon the premises, which the owner should anticipate. The dangerous thing must be so located so as to attract them from the street or some public place where they may be expected to be. An owner would not be liable if he maintained something for his own use which might be dangerous, but which would only be found by the children going upon his premises as trespassers."

In the *United Zinc Case, Supra,* the Federal Supreme Court adopted the Illinois rule.

This same distinction has been made by the Colorado Supreme Court in the *Hayko Case, Supra.* The Court first held that the shack itself was not "unusually attractive"; then

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[11]—*McDermott v. Burke,* 256 *Ill.* 401; 100 N. E. 168.

in answer to plaintiff's contention that dynamite caps constituted an attractive nuisance, the Court pointed out that "plaintiff could not see the box of caps till he had trespassed, therefore, the caps cannot be classed as the attraction."

4. *The doctrine is not applicable unless children have been attracted by the nuisance before and defendant knows of this fact.*

In the *United Zinc Case, Supra,* Mr. Justice Holmes was considering a poisonous body of water that looked clear and attractive. This body of water had not been frequented by children prior to this time and in holding for defendant, Mr. Justice Holmes said at page 617:

"It does not appear that children were in the habit of going to the place, so that foundation also fails."

In *Hardy vs. Missouri Pac. R. R. Co.*[12] defendant maintained a concrete conduit, seven hundred feet long, covering a shallow stream. The ends were open. At times defendant discharged hot water from its boilers through this conduit. A boy twelve years old attempted to walk through this conduit and was killed by a discharge of steam and hot water. The evidence established that children had walked through this conduit on at least three instances prior to the accident in question, *but there was no evidence that defendant knew this fact.* The lower court directed a verdict for defendant, and the case was heard on appeal by Judges Sanborn, Stone and Munger. In affirming the decision of the lower court, Judge Stone says:[13]

"Nothing approaching knowledge by defendant of any passage through the conduit of boys at any time was shown, and such knowledge cannot be inferred nor imputed from the three trips in the course of four years shown in the evidence. Such knowledge cannot be founded upon the circumstances that children played about the openings of the conduit. There is no limit, except physical ability, to what a child may do."

No attempt has been made to cover many of the numerous fascinating branches of this doctrine. The few principles outlined above being sponsored by the Colorado Supreme Court, the Circuit Court of Appeals of the 8th Circuit or the Federal

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[12]—266 Fed. 860 (C. C. A. 8th Circuit).
[13]—At page 861.

Supreme Court are of interest to Colorado lawyers and controlling in this state until these respective tribunals take a different view of the matter. It is believed that these fundamentals will furnish a basis for deciding most attractive nuisance cases and are based upon sound legal principles. May it be hoped, therefore, that in this jurisdiction the courts will continue to adhere to this humane, logical and well supported group of rules.

"BY LEAVE OF COURT FIRST HAD, * * *"

By Horace N. Hawkins, Jr., of the Denver Bar

IN the State of Colorado, and especially in its more populous counties, more criminal prosecutions for serious offenses are initiated by direct information filed by the district attorney, than by any other method. Incarceration of the defendant, if he does not post the required bail, or if bail be denied him, follows the filing of the information as a matter of course. The defendant named in the information may not be deprived of his liberty without due process of law, and the district attorney is not invested by law with any judicial authority the exercise of which renders imprisonment pursuant to his judgment a legal imprisonment. How then, is the deprivation of the liberty of the individual upon the filing of an information by the district attorney justifiable? It is the purpose of this article to discuss this question, (although with no pretense of exhaustive research, let it be here confessed), and the interrogatory corallary thereto as to what attack, if any, may a defendant imprisoned after the filing of such an information make upon his further detention, and upon what, if any, grounds should he be released therefrom.

Section 3 of Article II of the Constitution of the State of Colorado is as follows:

"That all persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."

Section 7 of Article II is in the following language:

"That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

Section 8 of Article II provides:

"That until otherwise provided by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all other cases, offenses shall be prosecuted criminally by indictment or information."

And finally,

Section 21 of the same article, known as the "Bill of Rights," guarantees

"That no person shall be deprived of life, liberty, or property, without due process of law."

These provisions of our fundamental law, together with the first clause of the 14th Amendment to the Constitution of the United States, constitute the basis on which the argument herein is built.

Pursuant to the section 8 of Article II of the Colorado Constitution, for many years the only method for prosecuting one charged with the commission of a felony was by indictment. In the year 1891 the legislature enacted the first statute giving the district attorney the right to file an information in a felony case. It is to this enactment, which appears on pages 240-243 of the session laws of 1891, and to the decisions of our courts thereunder, to which attention is now directed. The pertinent sections of that act are as follows:

"Section 1. The several courts of this State shall have, and may exercise the same power and jurisdiction to hear, try and determine prosecutions, upon information for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein as in cases of like prosecution under indictment.

"Sec. 2. All informations shall be filed in term time, in the court having jurisdiction of the offenses specified therein, by the district attorney of the proper county as informant, and his name shall be subscribed thereto, either by himself or by his deputy, and the names of the witnesses shall be endorsed thereon. All informations shall be verified by the oath of the district attorney, or his deputy, or by the oath of some person competent to testify as a witness in the case; the verification by the district attorney or his deputy may be upon information and belief. The district attorney shall also indorse upon said information the names of such other witnesses as may afterwards become known to him, at such time, before the trial, as the court may, by rule or otherwise prescribe."

It will be noted that under the last section the following five requirements are prescribed for an information:

1. It shall be filed in term time,
2. by the district attorney as informant,
3. the district attorney's name shall be subscribed thereto per se or by deputy,

4. It shall be verified by
   a. the district attorney or his deputy who may do so on information and belief, or
   b. by the oath of some person competent to testify as a witness in the case.
5. The names of the witnesses for the prosecution must be endorsed thereon.

"Sec. 3. The offense charged in any information shall be stated in plain, concise language, without prolixity or unnecessary repetition. Different offenses, and the different degrees of the same offense, may be joined in one information in all cases where the same might be joined by different counts in one indictment; and in all cases the defendant shall have the same rights as to all proceedings therein, as he would have if prosecuted for the same offense under indictment."

Section 4 prescribes a form of information and forms of verification to be used by the district attorney and by a person competent to testify as a witness in the case.

"Sec. 5. All provisions of law applying to prosecutions upon indictments, to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the passing or execution of any sentence, and to all other proceedings in cases of indictment, whether in court of original or appellate jurisdiction, shall to the same extent and in the same manner as near as may be, apply to informations and to all prosecutions and proceedings thereon."

This last section is important because it authorizes the issuance of a capias by the clerk on the filing of the information.

"Sec. 6. Any person who may according to law, be committed to jail or become recognized or held to bail, with sureties for his appearance in court, to answer to any indictment, may in like manner, be so committed to jail or become recognized and held to bail for his appearance to answer to any information or indictment as the case may be."

Section 7 provides for the inquiry by the district attorney into all cases of preliminary examination, and for the filing by him of his reasons in the event that he determines that an information ought not to be filed.

"Sec. 8. An information may be filed against any person for any offense when such person has had a preliminary examination as provided by law before a justice of the peace or other examining magistrate or officer and has been bound over to appear at the next term of the court having juris-

diction or shall have waived his right to such examination. But if a preliminary examination has not been had or when upon such examination the accused has been discharged or when in the opinion of the district attorney the affidavit or complaint upon which examination has been held is defective or when such affidavit or complaint has not been delivered to the clerk of the proper court the district attorney may upon affidavit of any person who has knowledge of the commission of an offense and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof upon being furnished with the names of the witnesses for the prosecution by leave of court first had, file an information, and process shall forthwith issue thereon."

From the last section, it is clear that in a case where no preliminary examination has been had, the information, in addition to complying with the five requirements specified by section 3 of the act must meet the following additional requirements:

6. There must be an affidavit of a person
    a. who has knowledge of the commission of the offense,
    b. such affiant must be a competent witness to testify in the case.
    c. such affidavit must set forth the offense and the name of the person charged with the commission thereof.
7. The district attorney must be furnished with the names of the witnesses for the prosecution,
8. The district attorney must first obtain leave of court to file the information.

NOTE: This article will be continued in the June number of DICTA.

DICTAPHUN

COMPARE ROSSI VS. COLORADO PULP AND PAPER COMPANY

"After a very careful consideration of the case, I find myself unable to agree with either the opinion of Justice Sayre or that of Justice Anderson; and, owing to the fact that a majority of the court does not agree upon either opinion as to the law, I feel constrained to give my reasons of dissent from both views. A further reason why I think it proper is that a majority of the court disagree with each of these opinions, and, if I understand it correctly, a majority of the court agree with me in dissenting from each opinion. If I am mistaken in that, it at least seems true that a majority of the court do not concur in either opinion, while all but myself agree that the judgment of the lower court should be affirmed." Evans, J., in *Hudgens v. Creola Lumber Co.*, 164 Ala. 561.

"Notwithstanding the earnest, almost violent, argument of learned counsel, we adhere to our former opinion." Root, J., in *Hall v. Baker Furniture Co.*, 86 Neb. 389.

"The foregoing are the views of the writer, but all the other members of the court are of a different opinion." Myers, J., in *Union Traction Co. v. Howard,* 173 Ind. 335.

JUST WHAT WE THINK

"There is nothing about the practice of the profession of the law which makes the business dangerous to the public. It does not threaten the public health or safety, nor is it demoralizing to the public." *Sonora v. Curtin,* 137 Cal. 585.

WRITE YOUR OWN HEAD FOR THIS ONE—WE'RE AFRAID

"The writer is himself a farmer, and has been one for more than forty years." Ross, J., in *Bliss v. Washoe Copper Co.*, 186 Fed. 825.

COLORADO IS AN OLD STATE—WE FOUND THAT OUT

"Some lawyers act as though they thought that because Oklahoma is a new State that they can do as they please, and that any kind of conduct will be tolerated. In this they are greatly mistaken, as some of them will discover to their sorrow, if they do not heed our admonition." Furman, P. J., in *Crawford v. Ferguson,* 115 Pac. 278.

DISSENT *A LA* WISCONSIN

Timlin, J., harboring an impression that the majority had overruled certain early and long-cherished precedents, dissented as follows:

"Now it may be that these precedents deserved this fate. They perhaps deserved death in order that we all might live. They were certainly guilty of being old. They were not innocent of having been born at the wrong time. They perhaps distracted the circuit judges in the consideration of the scholastic distinctions concerning lack of ordinary care. Like primeval man before his fall, unconscious of sin, they neglected to cover themselves with foliage. They obtruded their classic clearness and simplicity against the turgid top-liftiness which closed the nineteenth and began the twentieth century. They failed to stand for any corporate privilege or advantage. For all this they perhaps deserved amortization. But before Oblivion's curtain falls upon them forever, let me say that in my youth, before professional success and competence and a seat on the supreme bench had their value impaired by realization, and while such things were bright with the glamor of anticipation, these precedents seemed to me profound in their wisdom, unimpeachable in their authority, and clear, definite, and correct in their doctrine. Mentors of my bright days, farewell!"

THEM SOUTHERN JUDGES

"Some of the witnesses testified he a few times, when provoked, cursed her, though he certainly was not in the habit of using profane language, if he ever did, about which there is doubt; his common expressions being 'Dang it', 'Darn it', sometimes 'God damn it'." Lewis, J., in *Gains v. Gains,* 19 S. W. 929. Cf. *Southern Co. v. Wiley,* 88 Miss. 825, 841; 8 Dicta (6) 22.

WE ALWAYS LIKED THIS STORY

Albert G. Craig was defending before a country justice, and made reference to a verbal agreement between the parties. "Let's see yer verbal agreement", said the justice. "Hand it up here."

GIVE 'EM A MEDAL

"The opinion of the court was delivered by Ogden, J., affirming the decree of the chancellor. The reporter regrets that, after diligent search and inquiry, he has been unable to find it." *Hunterdon Bank v. Nassau Bank,* 17 N. J. Eq. 496.

ANNOUNCEMENT

The Editors desire to say, in response to any number of requests for information, that it is purely a coincidence that the Dictaphun and Colorado Supreme Court Decisions departments are in juxtaposition.

RECENT TRIAL COURT DECISIONS

DISTRICT COURT, DENVER—No. 108930—*People, ex. rel. Johnson vs. Hershey, et al. Geo. F. Dunklee, Judge. Decided December 31, 1930.*

Facts.—Action against Sheriff and Warden on their official bonds to recover damages on account of the release from County Jail, by defendants, of Roll, who had been committed on a body execution.

Defendants pleaded as defense Sections 8880 and 8887, C. L. 1921, which provided that persons "sentenced to and imprisoned in any county jail" may be allowed time off for good behavior. Demurrer.

Held.—That said statutes allowing time off to persons "sentenced" to county jails are no authority for giving time off to persons "committed" to county jails under body executions, but apply only to criminal cases.

Demurrer sustained.

DISTRICT COURT, DENVER—No. 107364—*Whiton vs. Sacino. J. C. Starkweather, Judge. Decided March 5, 1931.*

Facts.—Plaintiff brought suit for specific performance of an alleged contract of sale of real estate to the defendants, claiming that four monthly payments of $900.00 each were past due. Defendants claimed to be liable only for a reasonable rental. The court found all the issues in favor of the plaintiff and rendered judgment for $3,600 and interest. Defendants sued out a writ of error to the Supreme Court, which granted a writ of supersedeas. Plaintiff now applies to the lower court for the appointment of a receiver pending the determination of the appeal.

Held.—Application denied. While the lower court generally has power to appoint a receiver to preserve the property in question, after judgment and pending appeal, plaintiff here seeks a receiver not to preserve the real estate, but to accumulate a fund for which plaintiff can receive his $900.00 monthly payment. Such a receivership would be in furtherance of execution of the decree, and is not within the power of the lower court when supersedeas has been granted by the Supreme Court.

DISTRICT COURT, DENVER—No. 110312—*Deagle vs. Denver Tramway Corporation. C. C. Sackmann, Judge. Decided March 23, 1931.*

Facts.—Plaintiff's husband was injured by a street car operated by defendant corporation. Plaintiff, alleging negligence on the part of defendant's servants, brought suit for $2,500.00 for loss of the services, support, and companionship of her husband, and for $450.00, being expenses incurred due to nursing and other expenses. Defendant demurred for want of facts.

Held.—Demurrer sustained. A wife has no legal standing to sue for the loss of services of her husband (according to the great weight of authority, there being no Colorado decision on this question.)

COLORADO SUPREME COURT DECISIONS

(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

ELECTIONS—CONTESTS—DEMURRER—No. 12767—*Gunson v. Baldauf—Decided March 9, 1931.*

Facts.—The parties hereto were rival candidates for the office of county commissioner, and contest was filed. The contestee filed answer and counterclaim, and in the answer embodied what purports to be a general demurrer, and the Court below sustained the demurrer.

Held.—The action of contest was brought under Sections 7794 to 7804, C. L. 1921, which created an exclusive and summary procedure for the contest of an election of certain persons. The statement of contest enumerated sufficient facts to be good as against a general demurrer. Special demurrers are not authorized by the statute and cannot be interposed. Because special demurrers may not be interposed in contest of this character, and because the statement of contest states sufficient facts, the Court below erred in sustaining the general demurrer.

Judgment reversed.

ATTORNEYS AT LAW — UNPROFESSIONAL CONDUCT — REPRIMAND — No. 12469—*People v. Marshall—Decided March 16, 1931.*

Facts.—Respondent, a member of the Bar, an elderly man, found guilty of misappropriation of $11.00 Court costs, and proceeds of two small claims of clients.

Held.—Respondent reprimanded and directed to make restitution and his failure to do so, or commission of other like acts will result in automatic disbarrment.

APPEAL AND ERROR—BILL OF EXCEPTIONS—NO OFFICIAL REPORTER—NOTICE—No. 12758—*Ehrenkrook v. Winchester—Decided March 16, 1931.*

Facts.—Action for unlawful detainer brought by plaintiff in error in Justice Court, where plaintiff prevailed. On appeal to County Court, defendant prevailed. Testimony in Justice Court was taken by reporter, but testimony in County Court not reported. Plaintiff in error filed Bill of Exceptions containing transcript of testimony in Justice Court with affidavit of two persons that it was a substantially true and correct transcript, but no notice served upon defendant in error. County Judge refused to settle or allow Bill of Exceptions. Motion filed to dismiss (writ) and strike portions of Bill of Exceptions.

Held.—1. Transcript of evidence taken in Justice Court not properly a part of Bill of Exceptions because plaintiff in error did not comply with Section 420 of Code.

2. Motion to dismiss writ of error granted because in the absence of testimony, it is presumed there was no error.

Writ dismissed.

INJUNCTION — SET OFF — DISCHARGE IN BANKRUPTCY — No. 12093 — *Bacher v. Lord—Decided March 16, 1931.*

Facts.—Lord, plaintiff below, sought restraining order against collection of a judgment, and to offset against judgment certain notes defendant had given to a bank, and which plaintiff had purchased. It appeared that maker of note filed petition in bankruptcy and had been discharged from payment of notes. Judgment for plaintiff.

Held.—1. Discharge in bankruptcy releases bankrupt from all provable debts, except such as are excepted by the Bankruptcy Act.

2. Set off could not be allowed of debts discharged in bankruptcy.

Judgment reversed.

BAILMENT FOR HIRE—LIABILITY FOR RENTAL TO END OF TERM—FORFEITURE—No. 12360—*Electrical Products Corporation of Colorado v. Mosko —Decided March 16, 1931.*

Facts.—Plaintiff in error, plaintiff below, sued on contract for lease of electrical sign, for full rental under contract, which provided for monthly payments for 36 months, title to sign to remain at all times in lessor, lessor to service sign and in case of default, right to take possession of sign and hold it until paid, and when paid, lessee to again have sign for balance of term. Also in case of non-payment of rental installment lessor could declare rental to end of term due.

Held.—1. Transaction is a bailment for hire.

2. While the general rule is that when the bailor resumes possession of the hired chattel before the end of the bailment, he can only recover pro tanto for payment of the hire, yet the bailee may agree to terms that will compel him to continue payment.

3. In this case, the agreement made bailee liable for the rental for the entire term of the contract.

Judgment reversed, with directions.

AGENCY—ESTOPPEL—FORGED NOTE—PAYMENT—No. 12385—*The Colorado National Bank, of Denver v. Rehbein, et al.—Decided March 23, 1931.*

Facts.—The Colorado National Bank sued to foreclose a deed of trust, executed by Rehbein and given as security for the payment of her note for

$3,000.00, payable to the order of Louis A. Siener and to cancel a release of said deed by the public trustee, and to recover personal judgments against Rehbein, Giggal and Giggal for the principal of said note. Siener delivered said note for $3,000.00 to the Colorado National Bank with the deed of trust as collateral security for a loan of $3,000.00. Rehbein at no time knew that the Bank held her note and deed of trust. Siener's note was renewed from time to time. Mrs. Rehbein conveyed the real estate subject to the deed of trust, to Giggal and wife who thereafter, with the bank's knowledge, made all interest payments to Siener personally. Siener had forged a duplicate of the note and endorsed the payments on the forged note. The Colorado National Bank, without the consent of the maker or of the Giggals, permitted Siener to endorse on said note an extension of the time of payment thereof. Judgment for defendants below.

Held.—1. The payment to Siener constituted a defense against the Colorado National Bank.

2. The Bank permitted Siener to represent himself as the ostensible owner and holder of the Rehbein note and deed of trust and to collect interest thereon, and to endorse an extension thereon.

3. This established an agency by implication.

4. If Siener had disclosed this agency to the Giggals, they could have required the production and cancellation of the original note, but in order to avoid such disclosure, Siener forged a similar note and caused the Giggals to believe it to be genuine, and to make payment thereof. Payment to Siener because of his ostensible ownership coupled with his undisclosed agency to collect principal and interest of said note operates as a complete defense against bank's claim.

5. The bank was estopped to deny Siener's ownership.

Judgment affirmed.

REAL PROPERTY—COVENANT OF WARRANTY—COVENANT OF SEISIN—STATUTE OF LIMITATIONS—No. 12226—*Stone and Kochevar v. Rozich—Decided March 23, 1931.*

Facts.—Stone and Kochevar failed in the Court below in their action against Rozich to recover damages for alleged breaches of two covenants in a deed given to them by Rozich. Two causes of action were alleged: (1) for breach of covenant of a warranty; (2) for breach of covenant of seisin. The plaintiffs are here complaining of the judgment dismissing their action.

Held.—1. The plaintiffs were not entitled to recover on the covenant of warranty. Possession was delivered to and taken by them. That possession never was menaced within the meaning of the applicable statute. There never were any legal proceedings to obtain possession from the plaintiffs except the foreclosure proceeding which does not come within the terms of that statute.

2. The plaintiffs were not entitled to recover for breach of the covenant of seisin. Assuming that there was a breach of this covenant and that a cause

of action on the covenant once existed, this right of action was barred by the statute of limitations because by the great weight of authority this covenant, where a statute does not otherwise provide does not run with the land but is a purely personal covenant. It runs in the present as of the date of the deed and the breach, if any, occurs and the cause of action arises immediately upon the giving of the deed. The deed was given in 1921, and the action on the covenant of seisin was not commenced until 1926, which was more than three years thereafter, and the right of action was barred by the statute of limitations.

Judgment affirmed.

OIL AND GAS—WORKING AGREEMENT—ABANDONMENT—NO. 12439—*The Yarg Producing and Refining Company, et al. v. The Iles Investment Company—Decided March 30, 1931.*

Facts.—The Yarg Producing and Refining Corporation prosecutes this writ of error to review a decree of the lower court quieting title to real estate in The Iles Investment Company. The Iles Investment Company in 1923 deeded certain real estate to one Ahearn, reserving one-eighth (1/8) of oil and gas, and conveyed subject to a working agreement for development of the land, which was contained in a separate instrument, reference to which was made in the deed, which said separate instrument was recorded at the same time. As part payment Ahearn delivered Trust Deed on the same real estate and upon seven-eighths' (7/8) interest in oil and gas. Later, the trust deed was foreclosed, and trustee's deed executed and delivered to the Iles Investment Company, and possession taken by it. Before foreclosure Ahearn executed oil and gas lease to plaintiff in error. The Yarg Producing and Refining Corporation, which drilled a dry hole and abandoned the property in April, 1925, and made no further claim thereto until the institution of this suit, but claimed as assignee under the working agreement.

Held.—1. If there was any evidence that the Yarg Producing and Refining Corporation was ever assignee of the working agreement, it lost its rights by abandonment.

2. The operating agreement was not a conveyance of mineral rights, but was a contract for development.

3. The purpose of such an agreement in undeveloped territory is to determine the presence of oil and gas and is not drawn with the intent or purpose to give a perpetual right to explore for oil.

Judgment affirmed.

WORKMEN'S COMPENSATION—METHOD OF COMPUTATION OF WAGES—NO. 12760—*Williams Bros. Inc., et al. v. Grimm—Decided March 30, 1931.*

Facts.—Grimm was awarded compensation for an injury arising out of and in the course of his employment; during the twenty-six (26) week period preceding the injury, he worked for fifteen (15) weeks and earned $418.00, and was on a vacation for eleven (11) weeks thereof. The Commission

awarded him compensation under Section 4421 C. L. 1921 (B), by dividing $418.00 by twenty-six (26) weeks. The District Court ordered the Commission to enter an award under Section 4421 (c) which provides among other things, that where the method given under subdivision (b), by reason of illness or other reason the average weekly wage would not be a fair measure that the Commission can use the daily earnings or other reasonable method to compute the average weekly wage. His average weekly wage, under (b) was $16.08, and under (c) was $27.08, and the District Court ordered the commission to pay on the basis of average weekly wage of $27.67.

Held.—The District Court was right in ordering the Commission to make award under Section 4421 (c), but was wrong in directing a specific award of a certain sum per week. The amount is for the Commission to decide.

Judgment modified.

EXECUTORS AND ADMINISTRATORS—WIDOW'S ALLOWANCE—No. 12786—*Ahlf vs. King, Admin.—Decided April 6, 1931.*

Facts.—Plaintiff in error, and plaintiff below, who was widow of deceased, moved for an appraisal of the specific items of property allowable to her as widow, and filed her application for widow's allowance. King, as administrator de bonis non, resisted claim and claim was disallowed. Husband of plaintiff died intestate and plaintiff was his sole and only surviving heir at law. She was appointed administratrix, made no claim for widow's allowance, closed the estate, and received approximately $20,000.00 as sole heir. Later, brother of deceased, on discovery of additional assets had estate reopened and administrator de bonis non appointed, filed his claim against the estate, and if widow's allowance had been allowed there would have been nothing to apply on his claim.

Held.—1. A claim for widow's allowance is part of the expense of administration.

2. In the original proceedings, the widow made no claim for widow's allowance.

3. The widow, having received about $20,000.00 from her deceased husband's estate, suffered no financial loss and the estate having a net value of more than $2,000.00 so that it is immaterial whether she received the sum of $2,000.00 as a widow's allowance or its equivalent as an heir at law.

Judgment affirmed.

NEGLIGENCE—CHILDREN PLAYING ON UNSAFE DITCH BANK—DIRECTED VERDICT—No. 12488—*Smith, et al. vs. The Windsor Reservoir and Canal Company—Decided April 6, 1931.*

Facts.—This is an action by parents for damages because of the death of their minor son by drowning in an outlet ditch owned and used by the defendant-in-error in connection with the reservoir. The Court directed a verdict for the defendant in error and entered judgment on the verdict.

The child, seven years old, was precipitated into the water and drowned by the giving way of a false bank, composed of drifted sand blown upon ice formed in the ditch. This condition was of annual occurrence and there was evidence that the defendant in error knew of the condition, and knew that children frequently played upon the false bank.

Held.—There was proof that defendant knew of the danger and the fact that children actually played on the false bank, and yet permitted them to do so. Evidence offered was sufficient to go to the jury and it was error not to have submitted the case to the jury.

Judgment reversed.

APPEAL AND ERROR—IMPERFECT ABSTRACT OF RECORD—VIOLATION OF RULE 36 OF THE SUPREME COURT—No. 12315—*Kestle et al. vs. Preuit —Decided April 6, 1931.*

Facts.—Plaintiff below, defendant in error here, owned farm lands in Arapahoe County and entered into contract with defendant below for exchange of this farm for farm lands in Park County. One of the terms of the contract provided that the agreement was made subject to the right of plaintiff to inspect and approve the Park County lands, and the plaintiff claimed that he approved the Park County lands, but the defendants refused to convey, and plaintiff's action was for damages for failure to convey. There was a verdict of the jury for the plaintiff for $4,000.00, and judgment was entered thereon.

Held.—The abstract of record failed to summarize the evidence and the instructions of the Court were not contained therein, and it was impossible to determine from the abstract of record the questions which are argued in the brief of the plaintiffs in error. We must presume from the condition of the record before us that no prejudicial error was committed by the trial court. It is incumbent upon a plaintiff in error to show error. It sufficiently appears from the record that the testimony was more or less in conflict and we must presume that in the absence of anything appearing in the record to the contrary, that the Court properly advised the jury on the law applicable to the case.

Judgment affirmed.

BILLS AND NOTES—ESCROW—JUDGMENT BY CONFESSION—REINSTATING ORIGINAL JUDGMENT—No. 12807—*Axelson v. The Dailey Co-Operative Company, et al.—Decided April 6, 1931.*

Facts.—The Dailey Co-Operative Company obtained judgment below upon two promissory notes. Judgment was first entered by confession under power contained in notes and was assigned to Kelsey who levied execution upon lands of Axelson. Thereafter judgment was set aside upon motion and showing of meritorious defense, upon terms that the defendant give bond for value of land levied upon, to abide final judgment. Bond given, issues made up and trial had and upon failure to sustain defense, original judgment was reinstated.

Held.—1. On conflicting evidence judgment will not be disturbed.

2. Judgment was not entered on confession before notes were due as they contained a clause that upon failure to pay interest when due, entire amount could be declared due.

3. The court did not err in reinstating original judgment. Defendant was given full opportunity to present his defense, but having failed to establish same, and plaintiff's proof being complete, the court had no alternative but to reenter judgment. Judgment was complete as court had jurisdiction over the person and the subject and it was within discretion of court to impose terms on vacating original judgment.

Judgment affirmed.

PARTITION—TENANTS IN COMMON—LEASE AND MORTGAGE UPON PREMISES—ALIENATION—No. 12768—*McIntire vs. Midwest Theatres Company—Decided April 13, 1931.*

Facts.—Plaintiff in error was defendant below. The company brought suit against him to partition property which was owned by the parties as tenants in common. In May, 1922, McIntire and one Gill owned theatre property in Sterling. They executed a 10 years lease thereon. In 1924, the Midwest Theatres Company bought the interest of Gill and by consent of McIntire became the owner of the lease and in consideration of the reduction of the rent, the rent was secured by a mortgage upon the premises and it was further provided that a failure to pay promptly, should abrogate the reduction and restore the former rental. The court below granted partition, but upon condition that McIntire was to be protected in his rent for the premises only in the event he became the purchaser at the partition sale.

Held.—(1) The general rule is that a tenant in common is entitled to partition.

(2) But the right to partition may be alienated.

(3) In this case, the company contracted it away. It agreed to pay McIntire the rent until May 1, 1932 and secured these payments by a mortgage upon the leased premises and it cannot by partition, release that mortgage and evade rental payments.

Judgment reversed.

ELECTIONS—ABSENT VOTER—ACT CONSTITUTIONAL—No. 12772—*Bullington vs. Grabow—Decided April 13, 1931.*

Facts.—The parties to this election contest were rival candidates for the office of county superintendent. Two questions were presented (1) The constitutionality of chapter 94, session laws of 1921, an act relating to absent voters and (2) the sufficiency of certain votes cast thereunder.

Held.—The absent voters act is constitutional. Under the constitution of Colorado, a voter does not have to be personally present when "he offers to vote". The purpose of the act is laudable. It permits and encourages the exercise of the elective franchise by registered voters absent from their counties or too ill to attend the polls.

(2) Section 3 of the act is mandatory in requiring that when absent voter casts ballot, it must be accompanied by voter's affidavit identifying himself by duplicating his signature on the duplicate application and stating that such voter received the ballot and exhibited to, and marked the same in the presence of, election board or official authorized to administer oaths and that the voter has not voted at such election or primary, otherwise than by such ballot.

Judgment affirmed.

CONSTITUTIONAL LAW—OPINION OF SUPREME COURT REQUESTED BY HOUSE OF REPRESENTATIVES—WHEN REFUSED—No. 12832—*Decided April 18, 1931.*

Facts.—This court is in receipt of House Resolution requesting an opinion on proposed income tax law which had passed the house on 3rd. reading but which had not reached the Senate or the Governor. Three questions were asked. (1) Has the legislature authority to adopt a flat or graduated income tax. (2) Has it authority to use the proceeds thereof for certain specified purposes. (3) Has it authority to provide certain exemptions therefrom.

Held.—Sec. 3, Article VI of our constitution provides, "The Supreme Court shall give its opinion upon important questions upon solemn occasions when required by the Governor, the Senate, or the House of Representatives" (1) Sec. 3 authorizes an inquiry by the House only when a bill involving a constitutional or publici juris question is before the body. (2) It authorizes inquiry by the Governor only when such bill has been passed by both house and senate and is before him for signature. (3) The bill is no longer before the House and will never again be if its action be rejected or approved in toto by the Senate. If so, no such "solemn occasion" will confront that body. If otherwise, the Senate may not wish our opinion. If the Senate rejects the bill, no question in relation thereto can confront the Governor. If it passes the bill, he may not wish our opinion. (4) Since the questions asked do not fall within said sec. 3 the Court respectfully requests the House to withdraw them.

Per Curiam.

CRIMINAL LAW—UNLAWFULLY TRANSPORTING FISH—INSUFFICIENT INFORMATION—HOW ATTACKED—No. 12795—*Iwerks vs. The People—Decided April 20, 1931.*

Facts.—Defendant was found guilty of unlawfully transporting fish and sentenced to 30 days in county jail. The information charged that while lawfully in possession of the fish, that she did unlawfully transport the fish within the State of Colorado without having obtained a permit from the state Game and Fish Commissioner.

Held.—(1) Defendant's act as alleged in the information did not constitute a crime. Sec. 1507 C.L. 1921, merely provides one of the means of obtaining a transportation permit for fish but only when and if the law re-

quires such permit and when transportation is not otherwise provided for by some other section of the act. It does not pretend to create a statutory crime of any degree. (2) Defendants objections in the form of motion in arrest of judgment did not come too late. While it would have been better to make all objections to the information before the plea of not guilty, yet where the information is destitute of any criminal charge, objection can be taken at any stage of the proceedings.

Judgment reversed.

ATTORNEYS—DISBARMENT—No. 12765—*People vs. Cowen—Decided April 20, 1931.*

Facts.—Cowen, an attorney at law, was convicted of unlawfully owning a still for the manufacture of intoxicating liquor and sentenced to the penitentiary. Thereafter the Attorney General filed a petition to procure his disbarment on the ground that he had been convicted of a felony. He failed to answer and default was entered but a referee was appointed nevertheless to take proof and upon proof being taken, referee found him guilty.

Held.—Respondents conviction of this felony conclusively shows his disregard for law, inconsistent with his oath of office and indicates beyond question that he lacks the requisite moral character to engage in an honorable calling such as the legal profession.

Respondent disbarred.

JUDGMENTS—SUPPLEMENTARY PROCEEDINGS—CONTEMPT—No. 12800—*Sweeney vs. Cregan and the District Court of Pueblo County—Decided April 20, 1931.*

Facts.—Cregan obtained judgment against Sweeney and upon execution being returned unsatisfied, filed his verified petition for supplemental proceedings in aid of execution which resulted in an order commanding Sweeney to appear and answer concerning his property. Defendant moved to set aside and vacate order because no notice of application was given him, which was denied. Defendant questioned the sufficiency of the petition and refused to be sworn because he claimed that his answers might incriminate him.

Held.—(1) The only prerequisite to the granting of an order for examination is the execution returned unsatisfied. No notice is required. (2) The petition contained all the allegations necessary. (3) When a witness is called to testify and is sworn and interrogated, he may decline to answer because to do so may incriminate him or tend to do so, but this privilege must be claimed by the witness himself and subject to the determination of the judge whether or not the answer will have that effect; but before this can be determined, the question must first be asked and a witness cannot claim this privilege before any question is asked, much less refuse to be sworn. The defendant was clearly guilty of contempt in refusing to be sworn.

Judgment affirmed.

WORKMEN'S COMPENSATION—PARTIAL LOSS OF EYE—METHOD OF COMPUTING LOSS—NO. 12769—*The Colorado Fuel and Iron Co. vs. The Industrial Commission and Crawford—Decided April 20, 1931.*

Facts.—Court below affirmed an award of Commission allowing compensation to injured employee. In addition to temporary disability, Commission found that the permanent disability consisted of 40% loss of vision in left eye and that employee had previously lost all vision in right eye. Commission ordered that payment be made at rate of one half weekly wages for temporary disability and one half weekly wages for 124.8 weeks for permanent disability plus medical expenses.

Held.—This award was made under sec. 4450 C.L. 1921 but it should have been made under sec. 4447 as amended by laws of 1929, chap. 186, page 655. The legislature having made provision for compensation for disability arising from partial permanent impairment of vision based upon sec. 4447, as amended, and not having authorized an award in such cases to be based upon sec. 4450, the Industrial Commission had no power to make the award.

Judgment reversed with directions that award be based upon one half of weekly wages for 40 per cent of 104 weeks.

RECEIVERSHIP—EXCESSIVE FEES—CONTROL OVER LOWER COURT—NO. 12590—*Sparling Coal Company v. Colorado Pulp & Paper Company, et al.—Decided April 20, 1931.*

Facts.—This was petition for rehearing and modification of the opinion, the former opinion having been handed down January 13, 1931. Similar petitions were also filed in Myers v. Beck; Myers v. Pulp Company, and Rossi v. Pulp Company.

Held.—1. In addition to the disallowance of the sum of $2,000.00 receiver's fees as directed in the former judgment the additional sum of $12,500.00 allowed the receiver by the lower court is disallowed as excessive and unwarranted; and the receiver is ordered to restore all fees allowed him in excess of the sum of $5500.00.

2. Fees allowed attorneys Stidger and Walker affirmed.

3. Fees allowed attorneys Ginsburg and Gobble disallowed and remanded to lower court for further hearing.

4. Order of trial judge transferring cause to another judge while this cause was pending in the Supreme Court was wholly without jurisdiction.

5. Cause remanded with direction that all further proceedings in the court below shall be conducted before the present presiding judge of the second judicial district.

Opinion modified and rehearing denied.

Mr. Justice Hilliard filed dissenting opinion.

JUDGMENT—FRAUDULENT TRANSFER OF PROPERTY—*Roberts vs. Dietz*—No. 12696—*Decided April 27, 1931.*

Facts.—Dietz recovered judgment against Roberts for damages sustained in automobile collision. He then sued to set aside as fraudulent a trust deed given by Esther Roberts to secure the payment of three promissory notes. The Court below held that the conveyance was given to hinder, delay, and defraud Dietz, which judgment was reversed and case remanded for a new trial. On second hearing judgment below for plaintiff.

Held.—1. The trial court is the judge, not only of the credibility of witnesses and of the weight of the evidence, but of the inferences properly deducible from the facts and circumstances as proved.

2. On review the record is viewed in the light most favorable to the party successful in the trial court, and every inference fairly deducible from the evidence is drawn in favor of the judgment.

3. In view of the facts in this case, and the close relationship and intimate association of the parties, the finding of the trial court that the transfer of her property was fraudulent and transferred for the purpose of avoiding payment of the judgment, was supported by the evidence, and the inferences reasonably to be drawn therefrom.

Judgment affirmed.

AUTOMOBILE—INSURANCE—THEFT—*Union Insurance Society of Canton, Ltd. vs. Robertson*—No. 12585—*Decided April 27, 1931.*

Facts.—Robertson, plaintiff below, obtained judgment on policy of insurance for theft of his automobile. Plaintiff gave his son permission to use the car, but no express authority to his son to let anyone else have the car. The son and Elmer Carlson, and a young lady, drove to the apartment of William Cosgriff where the son and Carlson became intoxicated, and started to take the young lady home in the automobile, but went to another apartment, and on the way, collided with another automobile. After arriving at the other apartment, the son, on account of his condition was unable to continue any further, and Carlson got the automobile key from Robertson's pocket and took the young lady home, then returned the car to the Cosgriff apartment and left the car there. The plaintiff's automobile was found to be damaged and the key was on the floor of the automobile.

Held.—Under this state of facts, there was no larceny within the meaning of the statute, and there was no theft of the automobile within the terms of the policy; the loss therefor was not covered by the policy.

Judgment reversed with directions.